SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 715

KIM YOUNG,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

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KIM YOUNG,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (1) of the Rules of this Court, appellant submits this statement showing that the appeal in the above entitled cause is properly before this Court.

OPINION BELOW.

The opinion of the Appellate Department of the Superior Court of Los Angeles County, State of California, is reported in 3 Cal. App. Supp. 62, 85 Pac. (2d) 231.

A. JURISDICTION.

(1) Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928.

(2) State Statute Drawn Into Question and Decision in Favor of Its Validity.

The appellant contended in the courts below that the Municipal Code of the City of Los Angeles, Section 28.00 and 28.01 thereof (Los Angeles Municipal Ordinance No. 77,000, Ch. 2, Art. 8, reported in Municipal Code of the City of Los Angeles, 1936 Ed., p. 115) was repugnant to the Constitution of the United States in that, on its face and as applied to the appellant said ordinance deprives the appellant of due process of law and of freedom of speech and freedom of the press, as guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The decision of the court below was in favor of its validity.

Said sections of said municipal ordinance provide:

> "SEC. 28.00. Definitions.
>
> For the purpose of this Article, the following words and phrases are defined, and shall be construed as hereinafter set out, unless it shall be apparent from the context that they have a different meaning . . .
>
> 'Hand-Bill' shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public.
>
> SEC. 28.01. Hand-Bills—Distribution.
>
> No person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to, or upon any automobile or other vehicle."

A municipal ordinance is a "State Statute" within the meaning of Section 237 (a) of the Judicial Code, *Lovell v. City of Griffin*, 303 U. S. 444.

(3) Finality of Judgment.

The judgment forming the basis of the appeal is final both in form and in substance and disposes of all the elements of the controversy in the court below.

(4) Appeal Timely Taken.

The order and judgment from which this appeal is taken was entered on December 9, 1938. (On December 14, 1938, the petitioner, within the time limit fixed by the Rules of the Appellate Department of the Superior Court, filed his petition for rehearing. On the same day the Appellate Department of said Superior Court denied said petition for rehearing). On the 20th day of February, 1939, the appellant filed with said Appellate Department of said Superior Court his petition for appeal accompanied by his assignment of errors and the within "Statement as to Jurisdiction." On said date Honorable Hartley Shaw, as Presiding Judge of said Appellate Department, made and entered an order allowing the within appeal to the Supreme Court of the United States.

(5) Judgment of the Highest Court.

The judgment of the Appellate Department of the Superior Court of Los Angeles County, State of California, is that of the highest court in which, under the laws of the State of California, such judgment could be had in the case.

This case originated as a criminal prosecution against the appellant in the Municipal Court of the City of Los Angeles. Pursuant to Section 11 of the Municipal Code of Los Angeles a violation of Section 28.01 of the aforesaid ordinance constituted a misdemeanor.

Under the provisions of Section 1462 of the Penal Code of the State of California jurisdiction for the prosecution of misdemeanors is lodged in the Municipal Courts of the

respective municipalities. Under Section 1466 of said law, an appeal from the Municipal Court lies to the Superior Court.

The California courts have ruled that no appeal or review will lie from a decision by the Superior Court reviewing a decision of a Municipal Court: *Berg* v. *Traeger*, 210 Cal. 323; *Herbold* v. *Atchison, Topeka & Santa Fe R. R.*, 117 Cal. App. 430; *Berkeley* v. *Cunningham*, 218 Cal. 714; *Dungan* v. *Clark*, 159 Cal. 33; *McLean* v. *Freiberger*, 215 Cal. 1.

(6) Constitutional Questions Timely and Sufficiently Raised.

The claim that the Los Angeles Municipal hand-bill ordinance offends against constitutional liberty and denies freedom of speech and freedom of the press, under the Fourteenth Amendment to the Constitution of the United States, was asserted frequently and consistently in the courts below.

It was first urged and sustained by the first trial judge, who, on his own oral motion, adjudged the ordinance unconstitutional because of the decision of this Court in *Lovell* v. *Griffith, supra.*

From the order of the trial judge dismissing the criminal complaint against the appellant, "The People of the State of California" filed an appeal, as was the right of the prosecution under California procedure, to the Appellate Department of the Superior Court.

The Appellate Court reversed the order of the Municipal Court dismissing the proceedings, and remanded the case to the trial court for further proceedings. A copy of its opinion is hereto annexed and marked Exhibit "A". Because the order of the Appellate Department was not, at that stage of the proceedings, a "final judgment" so as to permit an appeal to this Court, no appeal was taken or

sought by the appellant, and the case was retried in the Municipal Court—this time resulting in a conviction.

In the course of the proceedings before the trial court, the appellant objected, prior to the introduction of any evidence, that the ordinance on its face and as applied to the appellant "was unconstitutional and void and of no force and effect on the ground that it constitutes a denial of freedom of speech and freedom of the press as guaranteed to the defendant by the due process clause of the Fourteenth Amendment to the Constitution of the United States" (R. 3). The trial judge overruled this objection (R. 4). A motion for a new trial was made at the end of the case based upon the same constitutional claim (R. 4) and likewise overruled (R. 5).

The appellant appealed from the judgment and sentence of the Municipal Court to the Appellate Department raising the same Federal constitutional issues (R. 5).

The court below, after expressly considering these constitutional objections, rejected them and upheld the ordinance (R. 10). The second opinion of the court is attached hereto and marked Exhibit "B".

In his petition for a rehearing, filed timely with the Appellate Department, as permitted by the rules of said court, the appellant urged that the decision and judgment of the Appellate Court of itself deprived him of freedom of speech and of the press under the Fourteenth Amendment to the Constitution of the United States. The court denied the petition for rehearing without opinion (R. 24).

(7) The Nature of the Case.

The facts in the case are not, and never have been, in dispute. That the appellant violated the ordinance is not denied; at the time of his arrest the defendant was engaged in the distribution of cards 3½ x 5½ inches in size;

some of them he had already given to pedestrians on the sidewalk adjacent to the Shrine Auditorium in Los Angeles and it was stipulated "he was proceeding to distribute the rest to other persons on the sidewalk" (R. 4). The cards which appellant was distributing bore the message:

"Back from
WAR-TORN SPAIN
Capta[illegible]
HANS AMLIE
Commander Lincoln Battalion
Brother of Congressman Amlie
JAY ALLEN
War Correspondent Expelled from
Rebel Spain
PILOS ARCOS
Spanish Actress and Singer
Chairman, LILLIAN HELLMAN
Screen Writer and playwright
TRINITY AUDITORIUM
847 So. Grand Ave.
March 21 —:— 8:00 P. M.
Admission . . . 25¢ and 50¢
AUSPICES: FRIENDS
LINCOLN BRIGADE
33 W. 2nd St. MI 7926
Mercury Printing Co.
855 N. Western Ave."

(There was no proof that any street littering resulted from the distribution by defendant (R. 4)).

For this act of distribution, announcing a public meeting in an auditorium in the City of Los Angeles, with respect to a matter of great current interest and grave public concern, the defendant, at the second trial in the Municipal Court, was convicted, fined $25.00, and, in the alternative sentenced to five days in the city jail (R. 94).

B. THE FEDERAL CONSTITUTIONAL QUESTIONS INVOLVED ARE IMPORTANT AND SUBSTANTIAL.

(a) Appellant Has Been Denied the Right to Freedom of Speech and of the Press.

The question involved in this case is whether or not a municipality may forbid the distribution of leaflets on its streets. Although the ordinance has been upheld on the theory that it is aimed at littering of the streets, it was not charged or proved that defendant himself littered the streets, nor indeed that any of the persons to whom leaflets were distributed littered the streets (R. 11).

Appellant contends that this decision is contrary to the decision of this Court in *Lovell* v. *Griffin, supra*, and likewise contrary to decisions of various State courts construing similar ordinances, including one of the co-ordinate Appellate Departments of the Superior Court in the State of California itself. On the other hand, other State courts have reached the same conclusion as did the court below in the case at bar and appeals in two of such decisions are now being taken to this Court.

It is apparent, therefore, that a decision by this Court is essential to settle the important and fundamental question here involved.

This Court will remember that in the *Griffin* case it held void an ordinance which required a permit for the distribution of literature on the ground that such ordinance was an improper restriction on freedom of speech and of the press. In that case the Chief Justice pointed out that the ordinance was not limited to literature that was obscene or offensive to public morals or that advocated unlawful conduct, and that it was not limited to distribution inconsistent with the maintenance of public order or involving disorderly conduct or the misuse or littering of the streets.

The ordinance in the case at bar, like that in the *Griffin* case, was not limited in any of the respects suggested by the Chief Justice. Indeed it goes beyond the ordinance condemned in the *Griffin* case because it constitutes an absolute prohibition of distribution, whereas the *Griffin* ordinance at least contemplated possible distribution by permission of the city manager. The only respect in which the court below suggested any difference between the two ordinances related to the places in which distribution was prohibited. The *Griffin* ordinance prohibited distribution on any street, sidewalk or park, or to any person in a street-car and also prohibited the placing of leaflets in an automobile or other vehicle.

The court below stressed this difference on the ground that the places selected in the Los Angeles ordinance were connected with the public welfare. The court was apparently of the opinion that the city council might determine that such prohibition was necessitated "by the evils which lack of restraint would bring about." The only evil intimated in the opinion is that street littering might result from the indiscriminate distribution of hand-bills.

We submit that the court below misapplied the applicable constitutional principle. Freedom of speech and of the press, being fundamental to the existence of any democratic government, may be restricted only where there is a clear and present danger that such restriction is necessary to prevent serious harm to the State. *Schenk* v. *United States*, 249 U. S. 52; *Herndon* v. *Lowry*, 301 U. S. 242.

Although it is acknowledged that the public streets and sidewalks are designed primarily for vehicular and pedestrian traffic, a secondary use has been recognized for many years—for the expression of opinion, unaccompanied by some immediate evil. Courts concerned with freedom of

thought, speech and assembly have upheld the right of the people to use the public streets and parks to hold meetings and to conduct parades, in the absence of riot, disturbance or traffic interference. Similarly from time immemorial, Americans have not only resorted to the publication and general distribution of pamphlets expressing their opinions on public issues, but have circulated such publications on the streets and in public places, as part of the exercise by them of what they have deemed to be freedom of speech and freedom of the press.

It surely cannot be urged that the need of the public for clean streets is so great or important that total restriction of leaflet distribution, as attempted by the ordinance here in question, may be permitted. Other appropriate means for the effectuation of the municipal purposes are readily available. Receptacles can be provided at slight cost in which waste matter can be deposited. Ordinances can be enacted which punish littering, but do not punish the distribution of leaflets.

Even before the decision of this Court in the *Lovell* case ordinances, substantially identical with the one now before this Court, were held invalid as interference with freedom of speech or limited to commercial matter only. In all these cases the ordinance was restricted to street distribution, yet it never was suggested that its validity could be sustained on that narrow ground. *People* v. *Armstrong,* 73 Mich. 288; *Chicago* v. *Schultz,* 341 Ill. 208; *Coughlin* v. *Sullivan,* 100 N. J. L. 42; *Dearborn Publishing Company* v. *Fitzgerald,* 271 Fed. 479. All of these cases were cited by this Court with approval in the *Lovell* case.

In the recent case of *C. I. O.* v. *Hague,* 25 F. Supp. 127, No. 651, October Term, 1938, Judge Clark considered the *Lovell* case controlling as to a section of the Jersey City ordinance which banned distribution on streets and public places. He

indicated the fallacy of the argument advanced in the instant case in the court below, saying at page 143:

> "The strategy is the use of ordinances designed and phrased to protect the streets against being littered with the consequent clogging of sewers, fire and disease hazards and the traditional frightening of horses. *People* v. *Armstrong*, 1888, 73 Mich. 288, 294, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; *Wettengel* v. *City of Denver*, 1895, 20 Colo. 552, 39 P. 343; *Anderson* v. *State*, 1903, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421, for the purpose of protecting the minds of the people who walk those streets against being littered with certain kinds of ideas and again traditionally perhaps, being frightened. One might suggest the availability of street cleaning departments or refuse receptacles and some courts have even declared these ordinances invalid on the ground of unreasonableness. Dillon, Municipal Corp., 5th Ed. § 589; *People* v. *Armstrong*, above cited; *City of Chicago* v. *Schultz*, 341 Ill. 208, 173 N. E. 276. Furthermore as the purpose is to prevent 'casting away' or 'throwing to the wind' there is a distinction between non-commercial and commercial (advertising) matter, the American tradition being to overcome sales resistance forcibly. *City of Philadelphia* v. *Brabender*, 201 Pa. 574, 51 A. 374, 58 L. R. A. 220; *Wettengel* v. *City of Denver*, above cited; *Coughlin* v. *Sullivan*, 100 N. J. L. 42, 126 A. 177. However that may be, it is unnecessary to elaborate the point of view of the Supreme Court's treatment of an identical ordinance of a Southern City."

This decision was affirmed by the Circuit Court of Appeals for the Third Circuit on appeal in an opinion not yet reported.[1]

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[1] See also *Ex Parte Pierce*, 127 Tex. 35, 75 S. W. (2) 264; *People* v. *Johnson*, 117 N. Y. Misc. 133; *People ex rel. Gordon* v. *McDermitt*, 169 Misc. (N. Y.) 743; *New Rochelle* v. *McCormick*, Westchester L. J., June 19, 1935, p. 997; *Cox* v. *Edgewater*, 60 N. J. L. J. 328 (1937); *People* v. *Toth*, Oct. 1933, II, I. J. A. Bull. p. 2; *City of Johnston* v. *Spencer*, VI, I. J. A. Bull. 714 (1937); *City of Newark* v. *Hill*, I, I. J. A. Bull. p. 2; *People* v. *Gorin*, IV, I. J. A. Bull. p. 3.

In *People v. Taylor*, 3 Cal. App. Supp. 70, 85 P. (2) 978, the Appellate Department of the Superior Court of California for the County of San Diego, affirmed a dismissal of a charge based on an ordinance of the City of San Diego which prohibits the distribution of leaflets upon any street, park or public place. In that case the leaflet was a commercial one advertising a theatre. Nevertheless, the Court, relying upon the *Lovell* case and many of the other cases hereinabove referred to, held that an attempt to prohibit the handing of leaflets to persons on the streets or in public places was a violation of freedom of speech and of the press as guaranteed by the United States Constitution and also by the State Constitution.

Since, under California law, both the court below (the Appellate Department of the Superior Court of Los Angeles County) and the Appellate Department of the Superior Court of San Diego County are each courts of last resort, and no appeal or review to any higher California court lies from their decisions, in the instant and Taylor cases, respectively, the Federal Constitution, unless there is a determination of the conflict by this Court, means one thing in San Diego County, California, and another in Los Angeles County, California. In Los Angeles, one may be punished up to six months and a fine of $500.00 [2] for doing that which constitutes the exercise of a constitutional right in San Diego.

Further, the Supreme Court of Wisconsin in *City of Milwaukee* v. *Snyder* (No. 749, October Term, 1938), not yet reported, affirmed a conviction for the distribution of a strike leaflet on the ground that the ordinance was valid as a littering ordinance. A like conclusion was arrived at by the Supreme Judicial Court in Massachusetts in *Commonwealth* v. *Nichols*, 1938 Mass Advance, 1969; 18 N. E. (2) 166, No.

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[2] L. A. Municipal Code, Section 11 (m).

849, October Term, 1938. These cases are being appealed to this Court.

In San Francisco a conviction for distributing circulars protesting the high price of milk was sustained by the Appellate Department of the Superior Court of San Francisco County under an ordinance substantially like the one in the case at bar. (*People* v. *Jones*, not reported).[3]

While many courts have brought meaning and reality to "freedom of the press" for political, racial and social minorities, by following the mandate and applying the spirit of the unanimous court in the *Lovell* case, and have wholeheartedly protected the right to disseminate political views through the circulation of leaflets and pamphlets, other courts throughout the United States have studiedly evaded or completely emasculated the opinion of this Court. They have recognized it in lip service, only to nullify it in practical application. Thus, although many trial courts have accepted the *Lovell* decision as binding and determinative, appellate courts have disagreed. Prior to the decisions of the Superior Court below in the instant case, the judges of the municipal court uniformly ruled the Los Angeles ordinance unconstitutional under the authority of the decision of this Court in the *Lovell* case.[4]

Judges in New York City; Watertown, Massachusetts; Camden, New Jersey; Stratford, Connecticut; Peekskill, New York; and Chicago, Illinois, have passed upon municipal ordinances similar to the Los Angeles legislation, but have not recognized the distinction between the ordinances before them and the *Griffin* ordinance as sufficient to uphold such legislation. They have adjudged such ordinances unconstitutional as offending constitutional liberty. Other judges in Chicago, Illinois; Long Island City, New York;

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[3] 7 International Juridical Association Bulletin 31.

[4] Los Angeles News, July, 1938, Supplement.

Bridgeport and Bristol, Connecticut, have taken a different view of the meaning and effect of the decision of this Court in the *Lovell* case, and have continued to sanction persecution of political radicals, labor leaders and strikers, and religious zealots, whose sole offense consisted of the circulation in city streets of circulars, leaflets and pamphlets expressing their points of view upon current and urgent political, labor and religious issues.[5]

If Alma Lovell, religious zealot, bent upon bringing Heaven on earth, by circulating religious tracts in the City of Griffin, had a constitutional right so to do, we believe that Kim Young, Korean student, concerned with saving Loyalist Spain and the world from Fascist terror, had the right to circulate cards on the streets of the City of Los Angeles, announcing a public meeting for the discussion of that vital issue.

(b) Appellant Has Been Denied Due Process of Law.

It is appellant's contention that he has been convicted for doing an act wholly innocent. The only theory upon which the ordinance was sustained by the court below was that it was aimed at street littering. Yet there was no evidence whatever that any littering resulted from the distribution on which this conviction rests (R. 11).

This Court has on numerous occasions reversed convictions where the act charged against a defendant was a wholly innocent one. Thus in *Fisk* v. *Kansas*, 274 U. S. 380, this Court reversed a conviction on the ground that the evidence failed to show that any unlawful acts were advocated by the organization which defendant was charged with assisting. In *Stromberg* v. *California*, 283 U. S. 360, it reversed a conviction for displaying a red flag because the law

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[5] Reported and commented upon in 7 International Juridical Association Bulletin 31.

punished such display "in hostility" to government without specifying that such hostility must be shown by unlawful means. In *deJonge* v. *Oregon*, 299 U. S. 353, this Court reversed a conviction because it rested solely on the auspices under which defendant spoke, not on the ground that he said or did anything unlawful.

So in the case at bar appellant has been convicted for the mere distribution of a leaflet without any contention that the contents of the leaflet were unlawful or that the leaflet was distributed in an unlawful manner.

Conclusion.

WHEREFORE it is respectfully submitted that the appellant in the above entitled cause comes within the proper jurisdiction of this Court.

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EXHIBIT "A".

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

Superior Court No. CR A 1511.

Trial Court No. 82837.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Appellant,*

vs.

KIM YOUNG, *Defendant and Respondent.*

Memorandum Opinion.

Appeal by plaintiff from order dismissing complaint of the Municipal Court of the City of Los Angeles, Joseph L. Call, Judge. Reversed.

The question presented by the action of the trial judge in dismissing the complaint before the trial was entered upon is the validity of section 28.01 of the Los Angeles Municipal Code under which defendant is charged. That section provides: "No person shall distribute any handbill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any handbill to, in or upon any automobile or other vehicle." Section 28.00 of the same code contains a definition of "handbill" which is made applicable to section 28.01 and is in these words: "Handbill shall mean any handbill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public." These provisions are subsantially the same as a former ordinance of the City of Los Angeles, except that the former ordinance contained no definition of the term "handbill" and extended its prohibition to cover "any handbill, dodger or notice of advertisement."

The validity of this former ordinance was attacked in this court in *People* v. *White*, (1935) Cr. A. 1255, and in upholding it this court there said: "Appellants argue that the ordinance contravenes the constitutional guaranties of free speech and free press, and is therefore void. With this argument we cannot agree. The rights mentioned are within the liberty safeguarded by the due process clause of the Fourteenth Amendment, but they are not absolute. *Near* v. *Minnesota*, 283 U. S. 697, 707-8; *Whitney* v. *California*, 274 U. S. 357, 371; *Gitlow* v. *New York*, 268 U. S. 652, 667. They are subject to the police power, in the exercise of which reasonable regulations as to the time, place and contents of speech or printing may be made. 12 Corpus Juris 952, sec. 468, 954 sec. 479. Under this power reasonable regulations of the use of public streets and places may be made, including those which, like the one before us, are intended to prevent the littering of such streets and places with waste material, and such regulations are valid even though they may incidentally affect the exercise of some right otherwise guaranteed by the constitution. *In re Anderson*, 69 Neb. 686, 689; 96 N. W. 149, 150; 5 Ann. Cas. 421; *Milwaukee* v. *Kassen*, 203 Wis. 383, 234 N. W. 352; *People* v. *St. John*, 108 Cal. App. (Supp.) 779; see also note 22 A. L. R. 1485. There are decisions to the contrary, relating to quite similar ordinances, but those above cited appeal to us as better grounded in reason. Some of the contrary decisions were made in states where the powers of municipal corporations depend on grants from the legislature, and were based in part on the rule that such grants are to be strictly construed. Such decisions can have little weight in this state, where sec. 11, Art. XI, of the Constitution authorizes each municipal corporation to exercise, within its limits and subject to general laws, the entire police power of the state (*In re Maas*, 219 Cal. 422, 425), and where the strong presumption in favor of the validity of legislative action applies to city ordinances. *People* v. *St. John*, *supra*; *Jardine* v. *Pasadena*, 199 Cal. 64, 72. We upheld the particular ordinance now under consideration in *People* v. *Kay*, Cr. A. 1177; *People* v. *Horiuchi*, Cr. A. 358; *People* v. *Silverman*, Cr. A. 227, and *People* v. *Shapiro*, Cr. A. 248,

against the same attack which is now made on it, and we see no reason to doubt the correctness of those decisions."

People v. *White, supra,* also held that the prohibition of the former ordinance was not limited to commercial handbills, etc. but extended to those of a political or religious nature. A similar ordinance was given a like interpretation in *Commonwealth* v. *Kimball,* (Mass. 1938) 13 N. E. (2d) 18, 114 A. L. R. 1440, 1443. This holding is fully applicable to the present ordinance. Hence it covers the handbills here in question, even if, as defendant contends, they are of a political nature.

We see no reason for receding from the decision in *People* v. *White,* and upon it the validity of the present ordinance must be affirmed. In support of it see *Commonwealth* v. *Kimball, supra,* 13 N. E. (2d) 18, 114 A. L. R. 1440, 1444, and cases cited in note p. 1447; *Sieroty* v. *City of Huntington Park,* (1931) 111 Cal. App. 377. The definition of the term "handbill" contained in the present ordinance does not materially alter the case. As stated in the foregoing quotation, there are decisions to the contrary, which we there declined to follow. It is earnestly urged upon us that our decision there is contrary to that lately made by the Supreme Court of the United States in *Lovell* v. *Griffin,* (1938) 82 Law ed. Adv. Opin. 660, and that this decision expressly approves those which we declined to follow. The ordinance condemned in the decision just cited as an infringement of the freedom of the press was one which forbade the distribution of circulars, etc. without a written permit, at any time or anywhere. It did not purport to be a regulation of the use of the streets. The court said regarding it: "There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, *or* the misuse or *littering of the streets.*" (Emphasis ours.) This language differentiates the ordinance there in question from that now before us, which is intended to prevent misuse and littering of the streets. In another case lately decided by the Supreme Court, *Senn* v. *Tile Layers Prot. Union,* (1937) 301 U. S. 468, 478, 81 L. ed. 1229, 1236, where

a state law authorizing the use of streets for picketing in labor disputes was upheld, the court said, "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The state may, in the exercise of its police power regulate the methods and means of publicity *as well as the use of public streets.*" (Emphasis ours.) This statement indicates that the court has not departed from the rule that the right of free speech is subject to police regulation relating to the use of public streets for that purpose.

It is argued that the ordinance cannot be regarded as one to prevent littering of the streets because its prohibition is not directed at the persons who drop handbills on the streets. But in order effectually to prevent the accomplishment of something regarded as an evil, it is often necessary to aim a prohibition at some act farther back in the chain of events than the last one which completes or brings about the result to be avoided. An illustration of his may be found in the prohibition laws. There the actual evil to be suppressed was the drinking of intoxicating liquor, or, according to the view of some, only its use to excess, but to accomplish this it was deemed necessary and proper to prohibit the manufacture, sale, transportation and possession of such liquor—acts which were in themselves harmless except as they facilitated the drinking of the liquor. The legislature may also frame its enactments upon a consideration of the ordinary tendencies and reactions of human nature. It needs but little observation of crowds of persons in the presence of passers of handbills to know that many persons entirely uninterested in a handbill will passively accept it and then at once, either with or without examination of it, drop it wherever they may be. The enforcement of a law against their doing so would in a crowd be practically impossible, merely from the number of persons involved. The number of distributers of handbills to such a crowd would, however, in most cases be small enough so that it would be possible for law enforcement officers to deal with them. Even in case of ordinary street traffic there would be the same sort of disparity of numbers, though not to such an extreme degree. The case

is in this respect within the rule of *Purity Extract & T. Co.* v. *Lynch*, 1912) 226 U. S. 192, 201, 57 L. ed. 184, 187.

As to the decisions which, it is claimed, are followed and approved in *Lovell* v. *Griffin, supra*, (1928) 82 Law ed. Adv. Opin. 660, we do not find them mentioned at all in the body of the opinion. After the statement "What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty (of the press) from every sort of infringement need not be repeated," appears a list of decisions of the Supreme Court, followed by a reference to a marginal note. This note begins with "See also" some cases cited, and then proceeds with "Compare" two of the cases relied on by appellants. One of the cases cited in the first part of this note, beginning with "See also," *Coughlin* v. *Sullivan*, (1924) 100 N. J. L. 42, 126 A. 177, declares that an ordinance such as we have here is valid, for the reasons above stated, at least as to handbills, etc., advertising commercial or business enterprises, but holds it unreasonable as to pamphlets relating to municipal affairs of the city where they are distributed. The mere reference in the note for comparison is not necessarily an approval of the cases so referred to.

The judgment of dismissal is reversed and the cause [fol. 53] remanded to the Municipal Court for further proceedings.

SHAW,
Presiding Judge.

I concur. While ordinarily we would have promptly reversed this judgment, because it is contrary to our repeated decisions, the desire to review anew the problem presented, because of its great importance, has caused delay until that review could be accomplished. A fresh consideration of the principles involved has left me convinced that the ordinance provisions involved in this case are not unconstitutional.

We must not lose sight of the fact that we judges are not the framers of the laws; legislative bodies, composed of men sworn as solemnly as we to uphold the Constitution,

are charged with the responsibility of determining what policies shall be enacted into ordinances. It is only when it appears without reasonable doubt that an ordinance is in conflict with a provision of our State or Federal Constitution that it falls within our right, and hence becomes our duty, to declare the ordinance inoperative.

If the ordinance in question is unconstitutional it is not because it is prohibited by the First Amendment to the Federal Constitution, for that is obviously inapplicable, but because it runs counter either to Article I, sec. 9 of our Constitution, which provided that "no law shall be passed [fol. 54] to restrain or abridge the liberty of speech or of the press;" or to the Fourteenth Amendment to the Federal Constitution. The vital importance of this right, implicit in the "liberty" which the Fourteenth Amendment protects against possible state attack, must not blind us to the fact that it is not an absolute right. Surely no one would claim that the right to advocate the recall of a public official is so compelling that one may not be denied the privilege of expressing one's views on the subject by painting them in bold letters on the city hall tower, or on the sidewalks of the city streets. A statute prohibiting the use of public buildings and public sidewalks as pages upon which to exercise the liberty of freely publishing one's ideas would clearly be upheld, a limitation though it be on a constitutional right. A statute prohibiting the use of the streets for the transportation of handbills, circulars, or similar publications, would as clearly be condemned as an unwarranted limitation.

Between these two extremes there lies a field wherein reasonable minds may honestly differ, and there is where I find this ordinance in question. Were I as councilman, it is quite likely that I should conclude that, while there was a "clear and present danger" that the free distribution of handbills on public sidewalks and in street cars would be a public nuisance, resulting in littered streets, clogged storm drains, fire hazards and annoyance to passersby, the general [fol. 55] public advantages of keeping open this avenue of the exchange of ideas outweighed the disadvantages of

spending public funds to keep the streets open. But the conclusion that an expense would be necessitated by the unchecked distribution of dodgers on the streets and that the public should be spared the expense, is a conclusion which may reasonably be made by the legislative body which is faced with its consideration. It is not for us to substitute our judgment of what is the sounder public policy for the opinion of the city council.

BISHOP,
Judge.

I concur. The ordinance condemned by the Supreme Court in *Lovell* v. *Griffin*, (1938) 82 Law. ed. Advance Opinions 660) was not in any sense a regulation of the use of public streets or places, or private property; it was, as the court makes manifest in its opinion (p. 662), an absolute prohibition of "the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager." Such prohibition was obviously obnoxious to the vital American principle of freedom of the press. But we have no such ordinance or question before us; we have merely a police regulation applicable to persons in their use of the public streets and parks, their conduct on street cars and with respect to other vehicles. Such regulations have been repeatedly upheld as is evi- [fol. 56] denced by the authorities cited in the memorandum opinion of Presiding Judge Shaw, which authorities are in no way impugned by the above cited opinion in *Lovell* v. *Griffin*.

It is not a material question on this appeal, but were it so, I think we would not interpret the language of the Los Angeles ordinance forbidding any person to "throw, place or attach any handbill to, in or upon any automobile or other vehicle" as prohibiting the placing of handbills for transportation or other lawful purpose in a vehicle possessed by such person himself.

SCHAUER,
Judge.

Date July 29, 1938.

EXHIBIT "B".

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Superior Court No. CR A 1547.

Trial Court No. 82837.

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,*

vs.

KIM YOUNG, *Defendant and Appellant.*

Opinion.

Appeal by defendant from a judgment of the Municipal Court of the City of Los Angeles, of conviction of violation of section 28.01 of the Los Angeles Municipal Code, A. E. Paonessa, Judge. Affirmed.

For Appellant: A. L. Wirin.

For Respondent: Ray L. Chesbro, City Attorney, W. Jos. McFarland, Assistant City Attorney and John L. Bland, Deputy City Attorney.

The provisions of the Municipal Code of the City of Los Angeles, which prohibit the distribution of handbills to pedestrians on the sidewalks of the city, do not, under the authorities so infringe any constitutional right that they may be held inoperative. The judgment that the defendant-appellant pay a fine of $25.00 for violating the ordinance is therefore to be affirmed.

The provisions of the Municipal Code which are involved appear in sections 28.00 and 28.01. There we find that "no person shall distribute any hand-bill to or among pedestrians along or upon any street, sidewalk or park, or to passengers on any street car, or throw, place or attach any hand-bill in, to or upon any automobile or other vehicle" and by way of definition it is declared that "Handbill shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public."

It may at times be a close question of fact, whether a per-

son is actually "distributing" cards, which the municipal code prohibits, or whether he is passing out a card or two as an isolated casual or occasional act, which, under a proper interpretation of its provisions, the code does not prohibit. *Anderson* v. *State*, (1903) 69 Neb. 686, 689, 96 N. W. 149, 150, 5 Ann. Cas. 421; *Coughlin* v. *Sullivan*, (1924) 100 N. J. L. 42, 126 Atl. 177; *Milwaukee* v. *Kassen*, (1931) 203 Wis. 383, 234 N. W. 352, 354. In this case, however, it plainly appears that the defendant was engaged in the distribution of cards. He had in his possession over three hundred colored cards, three and a half by five and a half inches in size; some of these he had already given to pedestrians on the sidewalk adjacent to the Shrine Auditorium, and, it was stipulated, he was "proceeding to distribute" the rest to other persons on the sidewalk. Obviously, the defendant violated the provisions of the Municipal Code, as he was charged with doing, and the judgment imposing sentence upon him must be affirmed unless in some way the state or federal constitution is offended by those provisions.

The Municipal Code's endeavor to create a public offense is futile, it is claimed, because contrary to the right to speak and publish freely, safeguarded by Art. I, section 9, of our state constitution, and by the Fourteenth Amendment to the federal constitution. The language of the former is: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The Fourteenth Amendment does not in terms protect against an invasion of the right freely to speak and to publish, but in its fending against the deprivation of liberty without due process, the right is held to be fully guarded. *Lovell* v. *Griffin*, (1938) 82 Law ed. Adv. Op. 660, 58 Sup. Ct. 666, and cases cited.

The right to speak and to publish freely is not an absolute one, free from all legislative control. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic." *Schenck* v. *United States*, (1919) 249 U. S. 47, 63 L. ed. 470, 473. "That a state, in the exercise of its police power, may

punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." *Gitlow* v. *New York*, (1925) 268 U. S. 652, 69 L. ed. 1138, 1146. Reasonable restrictions may be placed upon the time and place of the exercise of the right of free expression, as well as upon its content. In spite of the uncompromising language of our constitution, it was held in *In re Thomas*, (1909) 10 Cal. App. 375, that the city of Los Angeles could validly prohibit the making of a public speech in any public park or on any street, within a defined district. A similar ordinance of the city of Boston, prohibiting all public addresses, without a permit, in any of the public grounds of the city, was upheld by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Davis*, (1895) 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, the opinion being written by Mr. Justice Holmes, and it was thereafter held valid by the Supreme Court of the United States, in *Davis* v. *Commonwealth*, (1897) 167 U. S. 43, 42 L. ed. 71, 17 S. Ct. 731. The New York Court of Appeals held such a prohibitory ordinance to be constitutional in *People* v. *Atwell*, (1921) 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107 (Mr. Justice Cardozo concurring specially) and again in *People* v. *Smith*, (1934) 263 N. Y. 255, 188 N. E. 745. Still other cases, in accord, are reviewed in *Coughlin* v. *Chicago Park Dist.*, (1936) 364 Ill. 90, 4 N. E. (2d) I, itself reaching the same conclusion. While it may be said, as it was in the case of *People* v. *Smith*, *Supra*, that an ordinance such as we have just been considering "is not aimed at free speech," it is plain that it nevertheless hits it. An ordinance which declares that one may not speak within a defined district, to that extent abridges the right to speak freely. Although there is an abridgement, the ordinance may still be valid, if the abridgement is not the end sought by the ordinance, but is merely incidental to the operation of the means reasonably adopted to attain a lawful end. Such is the witness of the cases.

We do not subscribe to the doctrine that the city council could prohibit the distribution of handbills on the city streets in the absence of any public interest to be served by the prohibition, just because the streets are "city" streets,

under the council's charge; we hold that no restraint may validly be placed by public authority upon the constitutional right of free expression, whether it be to speak, pen, or print, even upon the public streets, which is not justified by the evils which lack of restraint would bring about. We may not, however, substitute our judgment for the city council's in determining how far, within the extreme limits of reason, the threatened evils require restrictions on the exercise of a constitutional right. It is only when we can say that clearly the line of reasonable debate has been passed that we have the right to declare invalid the deliverate act of the legislative body of the city.

Looking at the code before us, we cannot say that the city council had no reasonable cause for prohibiting the distribution of handbills on the sidewalks of the city, or that the city council acted arbitrarily in determining that some measure other than, or short of, such prohibition would not meet the needs reasonably well. Experience teaches that the immediate result of the indiscriminate distribution of handbills on public streets is the littering of of those streets. Curiosity and courtesy would induce most persons to take one of the cards offered by appellant; a glance, and lack of further interest, would release it from the hand. Those who are charged by law with determining the public policy which shall govern, may well have seen the problem as it was stated in *Anderson* v. *State, supra,* 69 Neb. 686, 96 N. W. 149, 150, 5 Ann. Cas. 241, as quoted in *City of Milwaukee* v. *Kassen,* (1931) 203 Wis. 383, 234 N. W. 352, 353: "The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition." The evil against which the code appears to have been directed is to be measured not merely by appellant's three hundred cards, but by the flood which might reasonably be expected if the code ceased to operate as a dike.

It has been argued that the remedy for littered streets is not to prohibit the distribution of handbills, but to en-

force the laws against letting them fall on the street or sidewalk. But in order effectually to prevent the accomplishment of something regarded as an evil, it is often found best, by those who determine the public policy, to prohibit an act, innocent in itself, but which is in the chain of events leading to the evil. Of laws founded on this principle our federal Supreme Court stated in *Purity Extract & T. Co.* v. *Lynch*, (1912) 226 U. S. 192, 57 L. ed. 184, 185: "It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. (Cases cited.) With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

Our conclusion that the individual's exercise of his constitutional right of free expression may be curbed by forbidding the distribution of handbills on public streets, finds support in the authorities. See *Anderson* v. *State*, *supra*, (1903) 69 Neb. 686, 96 N. W. 149; *City of Milwaukee* v. *Kassen*, *supra*, 203 Wis. 383, 234 N. W. 352; *Almassi* v. *City of Newark*, (N. J. Com. Pl.) (1930) 150 A. 217; *Commonwealth* v. *Kimball*, (1938) — Mass. —, 13 N. E. (2d) 18, 114 A. L. R. 1440. In support of principles on which, in part, our conclusion is based, we find *People* v. *St. John*, (1930) 108 Cal. App. 779, 288 P. 53; *Sieroty* v. *City of Huntington Park*, (1931) 111 Cal. App. 377; and *San Francisco Shopping News Co.* v. *City of South San Francisco*, (1934) 69 F. (2d) 879 (certiorari denied, 293 U. S. 606). There are authorities not in harmony with our conclusion, as may be discovered in the notes in 22 A. L. R. 1484 and 114 A. L. R. 1446. In connection with some of these cases, those that are based in part on a strict construction of legislative grants of power to municipalities, this should be noted respecting the police power of California cities: within their boundaries they exercise "the entire police power of the state, subject only to the control of general

laws." Sec. 11, Art. XI, State Constitution; *In re Mass*, (1933) 219 Cal. 422, 425.

Appellant earnestly urges that *Lovell* v. *Griffin, supra*, 82 Law ed. Adv. Op., 58 Sup. Ct. 666, is an authority requiring us to reverse this judgment. But we find nothing in the decision in that case to cause us to doubt the correctness of our conclusion. The ordinance under consideration there differs from ours in a vital particular appearing in the Supreme court's characterization of it: "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager."

The distinction to which we refer is not, that under the Griffin City ordinance distribution of pamphlets would be possible were a permit obtained, while no permit is provided for under our ordinance. In effect the two ordinances are identical in this regard, for the supreme court looked upon the permit feature as a nullity; the ordinance with it, was measured as though it were without it. The circumstance that some of the ordinances prohibiting speaking in public parks and streets, permitted the speaking if a permit was obtained, was not made the basis of approving the ordinance in any of the cases we noted. The absence, in our ordinance, of any provision for a permit, neither strengthens it nor does it invalidate it.

The distinction between the Griffin city ordinance and the Los Angeles code which is both vital and obvious, is that the former prohibited the distribution of handbills and cards anywhere in the city, while the latter prohibits their distribution only in a very limited number of places, which cannot be said to be wholly unconnected with public welfare. The supreme court did not indulge in *obiter dictum*; that is, it did not say that an ordinance such as ours

would be valid or invalid. It did point out, however, that the ordinance which it determined denied due process, was distinguishable from an ordinance such as ours in the particular we have emphasized, and thus did not extend its disapproval to an ordinance guarding against the littering of streets, which our ordinance (code) does.

Up to this point we have considered the validity of the provisions of the municipal code in question solely from the standpoint of the attack made upon them that they are destructive of the right freely to express one's views. It may be, however, that the real constitutional right involved is that rescued from an ordinance such as ours by *In re Thornburg*, (1936) 55 Ohio App. 229, 9 N. E. (2d) 516, where it was held that as the right to engage in business is a property right, to prevent one from advertising his business, by passing out cards on the sidewalk, is to deprive one of his property without due process. The cards which appellant was distributing bore this message:

"Back from . . .
WAR TORN SPAIN
Captain
HANS AMLIE
Commander Lincoln Battalion
Brother of Congressman Amlie
JAY ALLEN
War correspondent Expelled from
Rebel Spain
PEPI JUNEDA
Famous Spanish Dancer
PILAR ARCOS
Spanish Actress and Singer
Chairman LILLIAN HELLMAN
Screen writer and playwright
TRINITY AUDITORIUM
847 So. Grand Ave.
March 21—:—8:00 P. M.
Admission . . . 25c and 50c
AUSPICES FRIENDS LINCOLN BRIGADE
333 W. 2nd St.—:—Mi. 7926
Mercury Printing Co., 855 No. Western Ave."

Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views.

But if this be so, our conclusion is not thereby changed. We do not find the constitutional prohibition against deprivation of property without due process to be superior to that which protects one from being deprived of his liberty without due process; the latter is not, any more than the former, an absolute right; each may be abridged by a reasonable exercise of the police power for the public benefit. Indeed, if we had to choose, we should follow *Coughlin* v. *Sullivan, supra,* 100 N. J. L. 42, 126 A. 177, in finding it easier to uphold an ordinance forbidding the distribution of commercial handbills than one prohibiting the distribution of handbills intended to express one's views on questions of public concern.

For the foregoing reasons, we are of the opinion that the judgment of conviction should be, and it is, affirmed.

Dated December 9, 1938.

BISHOP,
Judge.

We concur:

SHAW,
Presiding Judge.

SCHAUER,
Judge.

Filed Feb. 20, 1939. L. E. Lampton, County Clerk, by J. B. Williams, Deputy.